Filed 11/17/16 P. v. DeSoto CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID J. DESOTO, Defendant and Appellant.	B266210 (Los Angeles County Super. Ct. No. NA094006)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. Remanded in part and affirmed in part.

William J. Capriola, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

David J. DeSoto was convicted by a jury of attempted murder. He contends: (1) the trial court erred in staying rather than striking a one-year prior prison term enhancement (Pen. Code, § 667.5, subd. (b));[1] (2) the abstract of judgment should be modified to reflect that he was convicted of attempted murder not attempted premeditated murder; and (3) he was entitled to one additional day of presentence custody credit. The People maintain that the trial court properly stayed the unused section 667.5, subdivision (b) enhancements, but contend the judgment should be modified to reflect that the trial court imposed the enhancements and stayed execution of the sentence in accordance with California Rules of Court, rule 4.447 (rule 4.447); the People concede the abstract of judgment should be corrected to reflect a conviction of attempted murder and that defendant was entitled to an additional day of presentence custody credit. We modify the judgment and affirm the modified judgment.

FACTS

The procedural nature of defendant's contentions makes a detailed recitation of the facts unnecessary. It is sufficient to state that, viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence

---

1 All future undesignated statutory references are to the Penal Code.

established that on November 17, 2012, defendant and victim Cynthia L. had been in a romantic relationship for several years and were living together. That night, defendant stabbed Cynthia multiple times. The transcript of Cynthia's 911 call, in which she identifies defendant as her assailant, was introduced into evidence. When later interviewed by police, Cynthia confirmed that defendant was the person who stabbed her. At trial, Cynthia testified that she was stabbed by two unknown men, not defendant; Cynthia still loved defendant.

PROCEDURAL BACKGROUND

Defendant was charged by amended information with attempted premeditated murder; enhancements for personal use of a deadly weapon (§ 12022, subd. (b)(1)) and personal infliction of great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)) were also alleged. In addition to the deadly weapon and great bodily injury enhancements, prior conviction and/or prior prison term enhancements were alleged pursuant to:

- Three Strikes (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i));
- Section 667, subdivision (a)(1) (§ 667(a)(1)); and
- Section 667.5, subdivision (b) (§ 667.5(b)).

The prior conviction/prior prison term enhancements were based on convictions in case Nos. A014932, A018839, A021352, A036573, NA069146, NA023904 and NA014007.

Defendant was found guilty of attempted murder but the jury found not true the premeditation allegation; it found true the enhancements for great bodily injury and use of a deadly weapon. Defendant admitted all of the alleged prior conviction and/or prior prison term enhancements. Defendant's motion to dismiss the Three Strikes priors was denied.

Defendant was sentenced to a total of 54 years to life in prison comprised of 25 years to life for attempted murder pursuant to the Three Strikes law, plus a consecutive one year for the use of a deadly weapon enhancement, plus a consecutive five years for the great bodily injury enhancement, plus four consecutive five-year terms pursuant to section 667(a)(1) based on the prior convictions in case Nos. A014932, A018839, A021352,[2] A036573; plus three consecutive one-year terms

---

[2] In case No. A021352, defendant was convicted of three serious felonies for which he served just one continuous prison term. A separate five-year section 667(a)(1) enhancement was alleged as to each of those three felonies and a separate one-year section 667.5(b) enhancement was alleged as to each of the three felonies. Because each felony conviction in case No. A021352 was not "on charges brought and tried separately," that conviction could support just one five-year enhancement. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 939.) Further, section 667.5, subdivision (g) precludes multiple one-year enhancements where

pursuant to section 667.5(b) based on the prior prison terms served in case nos. NA069146, NA023904, NA014007. Regarding the remaining section 667.5(b) enhancements, each of which was based on a prior conviction that had been used to impose a five-year section 667(a) enhancement, the trial court stated:

> "The remaining [section] 667.5(b) allegations are not imposed but stayed for the purpose of sentencing pursuant to the double use law that I cannot use it twice."

Defendant was given presentence custody credit for 1128 days, comprised of 981 days in actual custody and 147 days of good conduct credit. Although the jury found the premeditation allegation to be *not* true, the abstract of judgment incorrectly identifies the crime as attempted premeditated murder.

Defendant timely appealed.

DISCUSSION

Defendant contends the trial court erred in staying rather than striking the unused section 667.5(b) prior prison term enhancements. Citing *People v. Langston* (2004) 33 Cal.4th 1237 (*Langston*) and *People v. Jones* (1993) 5 Cal.4th 1142 (*Monroe*

---

the offender has served " 'one period of prison confinement, or block of time, for multiple offenses or convictions . . . .' [Citation.]" (*People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1668.) The trial court sentenced defendant to just one five-year enhancement and stayed all three of the one-year enhancements based on case No. A021352.

Jones),[3] defendant argues the trial court had authority to impose or strike the enhancements, but not to stay them. Citing *People v. Lopez* (2004) 119 Cal.App.4th 355 (*Lopez*) and its progeny, the People counter that the trial court correctly stayed the enhancements pursuant to California Rules of Court, rule 4.447 (rule 4.447). We agree with defendant that the unused enhancements must be stricken.

A. Governing Legal Principals

Pursuant to section 667(a)(1), "any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. . . ." Trial courts are without discretion to strike a five-year section 667(a)(1) prior conviction enhancement under any provision of law, including section 1385. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561 (*Garcia*).) "Only when a greater enhancement is available under another provision of law for the same prior offense, will a section 667(a)(1) enhancement not be imposed. (See § 667, subd. (a)(2); [citation].)" (*People v. Johnson* (2002) 96 Cal.App.4th 188, 201 (*Johnson*), disapproved

---

[3] Three unrelated cases, all captioned *People v. Jones*, are pertinent to our analysis. To avoid confusion, we refer to each of those cases using the defendant's first and last names.

of on another point in *People v. Acosta* (2002) 29 Cal.4th 105, 134, fn. 13.)

Section 667.5(b) provides for a one-year enhancement for each prior separate prison term served for any felony. Trial courts have discretion to strike a one-year section 667.5(b) prior prison term enhancement in the interests of justice pursuant to section 1385, subdivision (a). (*Garcia, supra*, 167 Cal.App.4th at p. 1561.)

In *Monroe Jones*, our Supreme Court held enhancements under section 667(a)(1) and 667.5(b) cannot both apply to the same offense and remanded the matter to the trial court with directions to strike the section 667.5(b) enhancement. (*Monroe Jones, supra,* 5 Cal.4th at p. 1153.)[4] But appellate courts subsequently disagreed whether a trial court could stay rather than strike an unused prior conviction enhancement. One line of cases held the unused enhancement must be stricken. (See e.g. *People v. Perez* (2011) 195 Cal.App.4th 801 (*Perez*); *People v. Snow* (2003) 105 Cal.App.4th 271 (*Snow)*; *Johnson, supra*, 96 Cal.App.4th 188; *People v. Jones* (1992) 8 Cal.App.4th 756 (*Eugene Jones*).) Another line of cases, beginning with *Lopez,*

---

[4] The *Monroe Jones* court declined to decide whether section 654 barred imposition of both enhancements. Two years later, in *People v. Coronado* (1995) 12 Cal.4th 145, the court held that section 654 does not apply to prior conviction enhancements. (*Id*. at p. 158.)

supra, 119 Cal.App.4th 355, held the unused enhancement should be stayed. (See e.g. *People v. Brewer* (2014) 225 Cal.App.4th 98 (*Brewer*); *People v. Walker* (2006) 139 Cal.App.4th 782, 794 (*Walker*).)

The defendant in *Eugene Jones* admitted two section 667(a)(1) prior serious felony convictions and two section 667.5(b) prior convictions for which he served separate prison terms. The trial court imposed sentence on both section 667(a)(1) enhancements and one section 667.5(b) enhancement and stayed sentence on the second section 667.5(b) enhancement.[5] The appellate court held it was error to stay rather than strike the second section 667.5(b) enhancement. (*Eugene Jones, supra,* 8 Cal.App.4th at p. 758.)

At issue in *Johnson, supra*, 96 Cal.App.4th 188, was sentencing under the alternative sentencing schemes set forth in the One Strike law for certain repeat sexual offenders (§ 667.61) and the Habitual Sexual Offender law (§ 667.71). Specifically, whether an unused section 667.61 sentence should be stricken or stayed when the defendant is sentenced under section 667.71. Relying on *Eugene Jones*, the *Johnson* court held the unused

---

[5] It is unclear whether the trial court stayed the second section 667.5(b) enhancement in an exercise of discretion or whether it did so because it was based on the same prior conviction upon which one of the section 667(a) enhancements was based.

section 667.61 enhancement should be stricken. (*Johnson,* at pp. 207–209.) The same court came to the same conclusion in *Snow, supra,* 105 Cal.App.4th at pages 281–283.

But the court in *Lopez, supra*, 119 Cal.App.4th 355, came to a different conclusion. Like *Johnson, supra* and *Snow, supra*, the issue in *Lopez* was what to do with an unused One Strike law finding when the defendant is sentenced under the Habitual Sexual Offender law. Expressly disagreeing with *Johnson* and *Snow*, the *Lopez* court held the unused finding should be stayed, not stricken. It reasoned that *Monroe Jones* was not authority for the proposition that an unused enhancement must always be stricken because the *Monroe Jones* court did not consider rule 4.447.[6] That rule reads:

> "No finding of an enhancement may be stricken or dismissed because imposition of the term either is prohibited by law or exceeds limitations on the imposition of multiple enhancements. The sentencing judge must impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and must thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay will become permanent on the defendant's service of the portion of the sentence not stayed."

---

6 Rule 4.447 was adopted in 1977 as rule 447 and renumbered 4.447 in 2001. Accordingly, it was extant when our Supreme Court decided *Monroe Jones* in 1992 and *Langston* in 2004.

The *Lopez* court distinguished between a trial court's exercise of discretion to not impose an enhancement and a legal impediment to imposing an enhancement. It reasoned trial courts are precluded from dual use of the same prior conviction to sentence under both sections 667.61 and 667.71; sentencing pursuant to the One Strike law is mandatory unless "another provision of law provides for a greater penalty" (§ 667.61(f)); the Habitual Sexual Offender law provided for a greater term than the One Strike law; trial courts are precluded from striking a One Strike law finding (§ 667.61(g)); to avoid violating section 667.61, subdivision (g) and the rule against dual use, rule 4.447 authorizes the trial court to impose the One Strike sentence but stay execution of that sentence. The *Lopez* court explained that rule 4.447 "is limited to the situation in which an enhancement that *otherwise* would have to be either imposed or stricken is barred by an overriding statutory prohibition. In that situation—and that situation only—the trial court can and should stay the enhancement." (*Id*. at p. 365.) Similar to section 654, Rule 4.447 implies the authority to stay "so that a defendant who is subject to one of two alternative punishments will not be wrongly subjected to the other; if, however, one of the two punishments is invalidated, the defendant will still be subject to the remaining one." (*Ibid*.; see *People v. McQueen* (2008) 160 Cal.App.4th 27, 33.)

Lopez was published in June 2004. Two months later, in August 2004, our Supreme Court in *Langston, supra*, 33 Cal.4th 1237, considered whether an additional prison term imposed on a conviction of escape from prison is a separate term within the meaning of section 667.5(b). (*Langston,* at p. 1242.) The *Langston* court stated: "Once the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken." (*Id.* at p. 1242, citing *Eugene Jones, supra*, 8 Cal.App.4th at p. 758.)

Although decided after *Lopez*, the *Langston* opinion does not mention that case or rule 4.447. There remains a conflict in the appellate courts as to whether *Langston* is controlling when sentencing on a prior conviction enhancement is precluded by law. For example, in *Walker, supra*, 139 Cal.App.4th at page 794, footnote 9, the court cited *Lopez* and rule 4.447 (but did not mention *Langston*) in support of its conclusion that a one-year section 667.5(b) enhancement that could not be used because it was based on the same prior conviction used to impose a three-year section 667(a) enhancement should be stayed because that "now appears to be the appropriate disposition under these circumstances. [Citations.]" Addressing the same issue, the court in *Brewer, supra*, 225 Cal.App.4th 98, held the unused enhancement should be stayed under *Lopez* and rule 4.447.

Seeking to harmonize *Langston* and *Lopez*, the *Brewer* court reasoned that *Langston* was inapposite because the issue in *Langston* was not the proper treatment of section 667(b) and 667(a) enhancements; *Langston* did not discuss rule 4.447; and the cases cited by *Langston* involved discretionary determinations to not impose an enhancement. (*Brewer,* at p. 106, fn. 9; see 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) IX Punishment, §§ 346, 347 [suggesting *Langston* resolved the disagreement over whether to strike or stay prior prison term enhancement when the trial court exercises its discretion to not use an enhancement, but when there is legal impediment to imposing the enhancement, rule 4.447 applies].)

But in *People v. Perez* (2011) 195 Cal.App.4th 801, 805, the parties and appellate court agreed that it was error to impose both a five-year section 667(a)(1) enhancement and a one-year section 667.5(b) enhancement based on the same prior conviction for which the defendant served a prior prison term, and that the trial court should have stricken rather than stayed the section 667(b) enhancement. And in *People v. Cordova* (2016) 248 Cal.App.4th 543, the court commented that the correct procedure is to strike prior prison term enhancements. (*Id.* at p. 549, fn. 3, citing *Langston, supra*, 33 Cal.4th at p. 1241.)

The People argue *Monroe Jones* and *Langston,* although California Supreme Court cases, are not controlling because

neither considered rule 4.447 and a case is not authority for a proposition not considered and the statement in *Langston* was mere dicta.[7] The People rely on *Lopez, supra*, 119 Cal.App.4th 355 (decided before *Langston*), *Walker, supra*, 139 Cal.App.4th 782, and *Brewer, supra*, 225 Cal.App.4th 98 (decided after *Langston*), for the proposition that the correct procedure under the circumstances here is to *impose* the section 667.5(b) enhancement, but then *stay execution* of the sentence.

B. Analysis

To avoid improperly imposing both a five-year section 667.5(a)(1) enhancement and a one-year section 667.5(b) enhancement on a single prior conviction, the trial court in this case stayed imposition of all section 667(b) enhancements that were based on prior convictions used to impose a five-year section 667(a)(1) enhancement. As we have discussed, there is a conflict among the appellate courts whether the proper procedure is to strike or stay the unused enhancement under such circumstances. In the interests of consistency within our division, we conclude that striking the unused section 667.5(b) enhancement is the appropriate procedure to follow unless and

---

[7] We note that appellate courts " 'generally consider California Supreme Court dicta to be persuasive,' but may reject dicta that 'does not, in our opinion, "reflect[ ] compelling logic." ' [Citation.]" (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1006.)

until the California Supreme Court resolves the issue otherwise. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The matter is remanded to the trial court with directions to (1) strike the unimposed section 667.5(b) enhancements relating to prior convictions in case Nos. A018839, A021352 and A036573; (2) modify the abstract of judgment to correctly reflect that defendant was convicted of attempted murder, not attempted premeditated murder; and (3) modify the abstract of judgment to reflect that defendant is entitled to 1,129 days of presentence custody credits comprised of 982 days in actual custody and 147 days of conduct credit. The amended abstract should be forwarded to the California Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.